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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 PH4 Corporation, and Del Webb) No. CV 08-0501-PHX-SMM
10 Corporation,)
11 Plaintiffs,)
12 vs.)
13 Sun City Real Estate, LLC, and Sharon) ORDER
14 Jones,)
15 Defendants.)

16 Pending before the Court is Plaintiffs PH4 Corporation and Del Webb Corporation's
17 ("Plaintiffs") Motion for Default Judgment (Dkt. 22) and Motion for Attorneys' Fees (Dkt.
18 29).

19 **BACKGROUND**

20 Plaintiffs filed their complaint on March, 13, 2008, alleging claims for trademark and
21 trade name infringement and unfair competition under 15 U.S.C. §§ 1114 and 1125(a), A.R.S.
22 §§ 44-1451 and 44-1460.05, and the common laws of the State of Arizona. Plaintiffs also
23 alleged a claim for unjust enrichment under the common law of the State of Arizona.
24 Defendants Sharon Jones and Sun City Real Estate, LLC ("Defendants") were properly served
25 on May 17, 2008. Although Defendant Sharon Jones entered a pro se notice of appearance
26 on June 10, 2008 (Dkt. 14), neither of the Defendants filed an answer to the complaint.

27 Pursuant to Rule 55(a) of the Federal Rules of Civil Procedure, the Clerk of Court
28 entered default in this matter on June 23, 2008. Subsequently, Plaintiffs filed a Motion for

1 Default Judgment on September 23, 2008 (Dkt. 22). Plaintiffs requested a number of
2 different remedies, including a permanent injunction, as well as attorneys' fees. The Court
3 held a hearing on October 9, 2008 to determine the amount of damages sustained by
4 Plaintiffs as a result of Defendants' actions. At the hearing, Plaintiffs stated that they were
5 only seeking a permanent injunction and attorneys' fees. Defendant Sharon Jones contested
6 the awarding of attorneys' fees, and the Court advised the parties to reach an agreement
7 regarding attorneys' fees. The Court gave Plaintiffs until October 24, 2008 to file a motion
8 for attorneys' fees.

9 On October 24, 2008, Plaintiffs filed a Motion for Attorneys' Fees and stated that
10 "the parties were unable to come to an agreement regarding fees" (Dkt. 29). The Court then
11 issued an Order stating that pursuant to Fed. R. Civ. P. Rule 54(d) and LRCiv 54.2(b), "the
12 last day for Defendants Sun City Real Estate, LLC and Sharon Jones to file a response to the
13 motion for attorney fees is November 17, 2008" (Dkt. 30, Order dated October 28, 2008).
14 Defendants did not file a response to the motion for attorneys' fees.

STANDARD OF REVIEW

16 It is within the district court's discretion whether or not to enter default judgment.
17 Albade v. Albade, 616 F.2d 1089, 1092 (9th Cir. 1980). Seven factors are generally
18 considered before entering default judgment: "(1) the possibility of prejudice to the plaintiff,
19 (2) the merits of plaintiff's substantive claims, (3) the sufficiency of the complaint, (4) the
20 sum of money at stake in the action; (5) the possibility of a dispute concerning material facts;
21 (6) whether the default was due to excusable neglect, and (7) the strong policy ... favoring
22 decisions on the merits." Eitel v. McCool, 782 F.2d 1470, 1471-1472 (9th Cir. 1986).

DISCUSSION

24 The Complaint in this matter was served upon Defendants on May 17, 2008 and
25 proof of service was filed (Dkts. 15 and 16). Cf. Pacific Atlantic Trading Co. v. M/V Main
26 Express, 758 F.2d 1325, 1331 (9th Cir. 1985) (noting that default judgment void without
27 personal jurisdiction). The Clerk of Court entered default against Defendants on June 23,
28 2008.

1 Entry of default effects an admission of all well-pleaded allegations of the complaint
2 by the defaulted party. Geddes v. United Financial Group, 559 F.2d 557, 560 (9th Cir. 1977).
3 Entry of default is proper where, as in the present case, the facts established by the default
4 support the causes of action pled in the Complaint. The Complaint also supports the finding
5 that Plaintiffs are entitled to the relief requested in the memorandum in support of default
6 judgment, which does not differ in kind from the relief requested in the Complaint. Henry
7 v. Sneiders, 490 F.2d 315, 317 & n.2 (9th Cir. 1974). Moreover, there are no policy
8 considerations to preclude the entry of default judgment of the type requested. See Eitel, 782
9 F.2d 1 at 1471-1472.

10 In their Complaint, Plaintiffs requested relief in the form of a permanent injunction
11 and attorneys' fees. Plaintiffs also requested various other remedies, but no longer seek
12 them.

13 **I. Permanent Injunction**

14 **A. Availability under Federal and State Law**

15 Under A.R.S. § 44-1451, the owner of a registered mark may proceed by civil action
16 against any person who infringes upon his mark by, among other things, using the registered
17 mark in connection with services that is likely to cause confusion, cause a mistake or deceive
18 a person as to either the affiliation or origin of the services. A.R.S. § 44-1451(A)(1). The
19 court "may grant injunctions to restrain any of such acts [listed in this section] as the court
20 deems just and reasonable." A.R.S. § 44-1451(B)(1).

21 Federal trademark law is nearly identical to the Arizona statute and also provides for
22 injunctive relief. 15 U.S.C. § 1116. The federal law also states that any such injunction may
23 include a provision directing the defendant to file with the court and serve on the plaintiff a
24 report in writing under oath setting forth in detail the manner and form in which the
25 defendant has complied with the injunction, within thirty days after service of such injunction
26 or any reasonable time the court directs. 15 U.S.C. § 1116(a).

27 **B. Ninth Circuit's Factors for Permanent Injunction**

1 A district court cannot issue an injunction unless the moving party satisfies the court
 2 that relief is needed because “there exists some cognizable danger of recurrent violation.”
 3 United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). The determination that such
 4 danger exists must “be based on appropriate findings supported by the record.” Federal
 5 Election Comm'n v. Furgatch, 869 F.2d 1256, 1263 (9th Cir.1989); Fed.R.Civ.P. 65(d). Rule
 6 65(d) does not require the district court to make an explicit finding that future violations are
 7 likely, but the district court must at least make explicit findings from which a finding of a
 8 likelihood of future violations could be inferred. Furgatch, 869 F.2d at 1263.

9 When finding a likelihood of future violations, the court must look at the totality of
 10 the circumstances. S.E.C. v. Murphy, 626 F.2d 633, 655 (9th Cir. 1980). The factors for
 11 permanent injunction are not individual prerequisites, which is clear from an examination of
 12 the cases in which courts have approved the granting of injunctions. Id. at 656 (citations
 13 omitted).

14 Factors that a district court may consider in making this finding include: 1) the
 15 degree of scienter involved; 2) the isolated or recurrent nature of the infraction; 3) the
 16 defendant’s recognition of the wrongful nature of his conduct; 4) the extent to which the
 17 defendant’s professional and personal characteristics might enable or tempt him to commit
 18 future violations; and 5) the sincerity of any assurances against future violations. U.S. v.
 19 Laerdal Mfg. Corp., 73 F.3d 852, 854-855 (9th Cir. 1995) (citing Furgatch, 869 F.2d at 1263,
 20 n. 5).

21 Here, Plaintiff PH4 Corporation stated in their Complaint that they are the owners
 22 of the trademark SUN CITY and its variations (Dkt. 1, ¶ 1). The SUN CITY Mark is the
 23 subject of numerous federal registrations for the SUN CITY services, and it is also the
 24 subject of Arizona state trademark registrations (Dkt. 1, ¶ 11-12). Further, Plaintiff PH4
 25 Corporation stated that they license the SUN CITY Mark to Plaintiff Del Webb, who is the
 26 registrant of the trademark in Arizona (Dkt. 1, ¶ 1). Plaintiffs alleged that Defendants Sun
 27 City Real Estate, LLC and Sharon Jones have been offering real estate agency and brokerage
 28 services under the mark Sun City Real Estate, which infringes upon Plaintiffs’ rights to the

1 SUN CITY Mark (Dkt. 1, ¶ 16-17). By the entry of default, Defendants admitted all of the
 2 well-plead allegations of Plaintiffs' Complaint. Geddes, 559 F.2d at 560. Plaintiffs stated
 3 a proper claim against Defendants, and this Court may grant an injunction as it deems just
 4 and reasonable. See A.R.S. § 44-1451(B)(1).

5 However, this Court must consider the Ninth Circuit's factors for issuing a permanent
 6 injunction. With regards to factors 1 and 3, Plaintiffs assert that Defendants have
 7 "knowingly and intentionally been using the SUN CITY Mark in connection with their real
 8 estate agency and brokerage services to reap the benefits of the good will associated with the
 9 SUN CITY Mark" (Dkt. 1, ¶ 18). With regards to factors 2 and 5, Plaintiffs also assert that
 10 they "have sent numerous cease and desist letters to Defendants demanding that they cease
 11 doing business under the SUN CITY Mark" and "Defendants have refused to cease offering
 12 real estate agency and brokerage services under the SUN CITY Mark" (Dkt. 1, ¶ 17). Also
 13 with regards to factor 5, Defendants did not respond to the Complaint so there have been no
 14 assurances against future violations. There is no evidence about the fourth factor,
 15 Defendants' professional and personal characteristics that might enable or tempt him to
 16 commit future violations.

17 At the hearing on October 9, 2008, Defendant Sharon Jones stated that she did not
 18 contest the permanent injunction, but at the same time she did not believe she was infringing
 19 on Plaintiffs' trademark and trade name. After assessing the totality of the circumstances,
 20 this Court finds that there is a likelihood of future violations. Murphy, 626 F.2d at 655.
 21 Therefore, the Court will issue a permanent injunction because "there exists some cognizable
 22 danger of recurrent violation," which is supported by the record. W.T. Grant Co., 345 U.S.
 23 at 633; Furgatch, 869 F.2d at 1263; Fed.R.Civ.P. 65(d). The Court will direct Defendants
 24 to file with the Court and serve on Plaintiffs a report in writing under oath setting forth in
 25 detail the manner and form in which Defendants have complied with the injunction, within
 26 thirty days after service of such injunction or any reasonable time the court directs. See 15
 27 U.S.C. § 1116(a).

28 **II. Attorneys' Fees**

1 While under A.R.S. § 44-1451 the court may award a prevailing plaintiff reasonable
2 attorneys' fees only in certain circumstances, under federal law "the court in exceptional
3 cases may award reasonable attorney fees to the prevailing party." 15 U.S.C. § 1117(a);
4 A.R.S. § 44-1451(B)(3)-(4) (prevailing plaintiff will only recover reasonable attorneys' fees
5 if a defendant unauthorizedly uses computer software in a nonpersonal, commercial way or
6 improperly uses a mark in a personal, noncommercial way). A trademark case is exceptional
7 for purposes of an award of attorneys' fees where the infringement is malicious, fraudulent,
8 deliberate or wilful. Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1384-85 (9th Cir. 1984)
9 (citing Playboy Enters. v. Baccarat Clothing Co. Inc., 692 F.2d 1272, 1276 (9th Cir.1982)).

10 Here, Plaintiffs have alleged neither that Defendants used an authorized copy of
11 software nor improperly used a mark in a personal, noncommercial way. Therefore, an
12 awarding of attorneys' fees would not be appropriate under state law. On the other hand, the
13 Court finds that an exceptional case exists so that reasonable attorneys' fees will be awarded
14 to Plaintiffs under federal law. Plaintiffs assert that Defendants have "knowingly and
15 intentionally been using the SUN CITY Mark in connection with their real estate agency and
16 brokerage services to reap the benefits of the good will associated with the SUN CITY
17 Mark." The Court finds that Defendants' infringement of the SUN CITY Mark was
18 malicious, fraudulent, deliberate, or willful. The parties were unable to come to an
19 agreement regarding fees, and Plaintiffs have filed a motion for attorneys' fees pursuant to
20 LR Civ 54.2. Defendants have not responded to the motion for attorneys' fees. The Court
21 has critically analyzed the motion and declarations presented by Plaintiffs pursuant to LRCiv
22 54.2 and finds that the requested amount of \$5,919.00 in attorneys' fees is reasonable. See
23 *id.* at 1385.

CONCLUSION

25 | Accordingly,

26 **IT IS ORDERED GRANTING** Plaintiffs' Motion for Judgment Upon Default
27 (Dkt. 22).

1 **IT IS FURTHER ORDERED** that the Clerk of Court shall enter Default Judgment
2 against Defendants and in favor of Plaintiffs.

3 **IT IS FURTHER ORDERED** that Defendants, their agents, servants and employees
4 and all persons in active concert or participation with them are enjoined from:

5 1. Using, promoting, or advertising the SUN CITY Mark in connection with its real
6 estate agency and brokerage services; and

7 2. Using the SUN CITY Mark in any way that indicates, suggests, represents or is
8 likely to lead the public or individual members of the public to believe that Defendants are
9 in any manner, directly or indirectly, associated, connected with, licensed, authorized,
10 franchised or approved by Plaintiffs or Plaintiffs' licensees.

11 **IT IS FURTHER ORDERED** that Defendants shall file with the Court and serve
12 on Plaintiffs a report in writing under oath setting forth in detail the manner and form in
13 which Defendants have complied with the injunction, within thirty days after service of such
14 injunction.

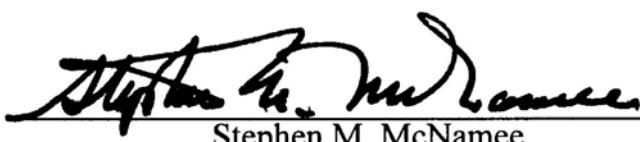
15 **IT IS FURTHER ORDERED** that the Court retains jurisdiction over this matter.

16 **IT IS FURTHER ORDERED GRANTING** Plaintiffs' Motion for Attorneys' Fees
17 (Dkt. 29).

18 **IT IS FURTHER ORDERED** that Plaintiffs are awarded attorneys' fees in the
19 amount of **\$5,919.00**.

20 **IT IS FURTHER ORDERED** that the Clerk of Court shall terminate this action.

21 DATED this 1st day of December, 2008.

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24 Stephen M. McNamee
25 United States District Judge
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